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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

REPLY BRIEF

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1. Respondent Hilyer does not appear to argue that the contingent interests at issue in this case were included in the definition of "wages" when the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") was originally passed in 1927. Instead, respondent argues that as changes in labor practices slowly evolved over the years, the definition of "wages" changed so as to include these contingent interests as either a money rate or other advantage within the meaning of the statute (Resp's Brief at pp. 7, 17). Although it is not entirely clear, respondent seems to be arguing that this evolving change had been accomplished by 1972, because Congress' *failure*

to change the definition when it revised the statute in 1972 is pointed to as proof that Congress *adopted* the new definition in that year.

This is a strange argument indeed. No court had held prior to 1972 that these contingent interests were part of "wages", and during the extensive hearings on the 1972 statutory revisions, no mention was ever made of any alleged change in definition. Yet Congress' failure to act in 1972 is taken as acquiescence in a new definition that was never brought to its attention. Surely if a change with such broad implications is to be read into a statute, it is up to the legislative branch to make the change. Since Congress made no changes in the definition of "wages" when it carefully considered all aspects of the Act and made substantial revisions in other sections in 1972, the courts must conclude that the original definition still prevails.

In this regard, one must ask whether Congress would have legislated the largest benefit increase in the history of compensation in 1972, so that benefits now run seven times what they were in prior years, if Congress had known that union fund payments were to be added to the benefits actually legislated. When one considers that these union fund payments would amount to a 30-60% increase in average weekly wages, the answer is clear.

2. Respondent Hilyer makes the extraordinary contention that because there are no federal cases which *disagree* with the opinion below, the opinion must be right. The fact is that there are no federal cases which *agree* with the opinion below. This is because no one ever contended in a federal court, until this case, that the types of contingent interests involved here were part of "wages." Even the Department of Labor, which argued at one stage below that certain payments into union trust funds should be considered "wages", has now completely reversed itself and admitted that its position below was wrong (Brief

for the Federal Respondent at p. 4 n.2). This return to the Department's longstanding interpretation of the Act shows why the instant case is the first one in the federal courts in which this novel theory has been put forth. If in fact the meaning attributed to the Act by respondent is "plain" (p. 7), and the issue is not novel (p. 3), one wonders why no one thought of respondent's interpretation for 70 years.

3. Respondent and amicus AFL-CIO [1] portray this case as insignificant. All of the known facts show otherwise.

Litigation concerning the central issue, for example, has virtually come to a halt awaiting action by this Court. Thus, as reflected in the Solicitor General's Supplemental Memorandum for the Federal Respondent, the Labor Department's Benefit Review Board has granted reconsideration of *Minick* v. *Levin Metals Corp.*, No. 80-835 (B.R.B. Apr. 28, 1982), a decision which followed the ruling below. But the Board has also deferred its reconsideration of *Minick* until the Ninth Circuit acts in *Duncanson-Harrelson Co.* v. *Director*, Nos. 79-7093 and 79-7094. The Ninth Circuit, in turn, has not even calendared *Duncan-Harrelson*, and apparently will not do so until after this

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[1] While the AFL-CIO takes a position before this Court contrary to that of petitioner and the Solicitor General, it is noteworthy that neither this union nor any other labor representative has opposed a section of a bill that has passed the Senate which would effectively reverse the decision below. See, *e.g.*, the testimony of Mr. Jay Power, Legislative Representative of the AFL-CIO, on S. 1182 and H.R. 25 before the Subcommittee on Labor Standards of the House Committee on Education and Labor, August 17, 1982, and the statement of the International Longshoremen's and Warehousemen's Union on the same bills before the same Subcommittee on the same date. There is no indication, of course, that a similar provision will ever pass the House, survive joint House and Senate approval, and be signed by the President.

The controlling D.C. Code provision was reenacted prior to the decision below and became effective July 26, 1982. The new Code provision, however, includes the same wage definition as before. 36 D.C. Code § 301(19).

Court rules on the instant case. In the only other case at the applleate level which raises the same issue, the Fifth Circuit has withheld its decision "pending action by the Supreme Court" in the instant case. *Levis* v. *Farmers Export Co.*, Nos. 81-4258 and 81-4273 (see Appendix A hereto). In the meantime, claims for union trust fund payments as part of "average weekly wage[s]" which were beginning to be made before Deputy Commissioners throughout the country are now being held in abeyance until the issue is resolved by this Court. Such claims relate not only to the three types of funds at issue in this case but to various other types of funds as well. If this Court failed to act, it is clear that Deputy Commissioners and then the federal courts would be inundated with a wide variety of claims. Thus, the argument of respondent and the AFL-CIO that the opinion below was a very narrow one, unlikely to have nationwide impact, is wholly refuted by what is actually occurring across the country.

4. The limited impact argument is also rebutted by the Solicitor General's brief and by the amicus briefs of the Alliance of American Insurers (150 insurers), the National Association of Independent Insurers (500 insurers), the American Insurance Association (150 insurers), and the National Association of Stevedores (68 companies). These briefs show without question that the Labor Department, insurers and private industry would be at a complete loss as to how to proceed if the decision below were to stand, and particularly if its ruling were to become applicable in other Circuits. Premiums and insurance coverage simply cannot be calculated for hundreds of thousands of workers on the basis of myriad union funds. In San Francisco alone, for example, as a result of collective bargaining between employee unions and the Pacific Maritime Association, there are eight different union funds, and each would have to be calculated for each worker, both for the future and, perhaps, retro-

actively. The situation is further complicated by the fact that while some union funds are maintained on an annual basis, others change every six months. These briefs paint a picture of such chaos that, as the Solicitor General points out, "it is appropriate for the Court to grant review here in order to resolve the uncertainty and minimize the adverse consequences created by the court of appeals' erroneous departure from the longstanding administrative interpretation of the LHWCA" (p. 9).

5. A problem which respondent and the amicus have carefully avoided is one of taxable income. If these union fund payments are to be treated as payments to the employee or of value to the employee, must not the employee be taxed on such payments, and must not the employer withhold taxes when such payments are made? These payments have never been treated in this fashion before, but the decision below would require an entirely new approach. Not only would this cause havoc for the employee, who must pay taxes on funds as to which he may never acquire a vested interest, but it would create incredible confusion for employers who would be burdened with the task of attempting to determine which payments are subject to withholding taxes and which are not. Because of increased federal income tax withholdings, employees hereafter would have a lower take-home pay then they do today.

6. Neither respondent nor amicus AFL-CIO has addressed our central core argument that the compensation a widow receives under this Act should represent what she lost by virtue of the employee's death. The question should be, for example, what is the value of a training fund to a deceased employee's widow? The obvious answer is "none". Our conclusion is pointed up by the fact that even the amicus cannot support the approach of the court below. That approach was to determine the value of the payment to the employee, whereas the amicus would attempt to determine the cost to the employer. Neither

approach is correct, as demonstrated not only by the Petition but by the brief of the Solicitor General.

In a similar vein, respondent makes much of the fact that the union fund payments were "negotiated benefits" (p. 2). We submit that it is utterly irrelevant whether the payments were negotiated or not. What counts is whether the payments were part of a standard of living which was lost by reason of the death. Respondent implies (*id.*) that the widow will now have to purchase privately what she lost when the employee died. But an apprentice training fund will never have to be purchased by a widow. Such a fund is for the enhancement of the employee's skills, not his widow's. The same applies to pension funds, in the sense that the widow has no vested right in them. With the passing of the employee, the pension abates.

7. Respondent is simply wrong in her reliance upon other statutes. The Davis-Bacon Act (p. 8) proves our point, not hers, because there Congress demonstrated its ability to include contingent interests by specific language when such interests were meant to be included. As for FECA (p. 9), no benefits under this statute have ever been awarded on the basis of union fund payments. Similarly, such payments have never been treated as wages for calculating premiums under the Social Security Act or ERISA (p. 10).

CONCLUSION

We submit that the various briefs supporting the granting of certiorari demonstrate, without question, that the interpretation placed on the LHWCA by the Court of Appeals is directly contrary to the intent of Congress when the Act was passed in 1927 and never changed since, as well as the interpretation followed by the Department charged with carrying out its mandate. In addition, the briefs show the impossible task that would be faced by the Government, industry and the courts in carrying out the strictures of the opinion below, as well as the burden that would ultimately fall on the employee to whose benefit the Act's provisions are supposed to accrue. A system of benefits previously noted for its clarity and its prompt and effective method of redress will be converted into a time-consuming, confusing and costly enterprise—unless this Court grants certiorari and reverses the judgment below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

June 9, 1982

TO ALL COUNSEL OF RECORD

No. 81-4258—Levis v. Farmers Export Co., Et Al.
No. 81-4273—Waters v. Farmers Export Co., Et Al.

Dear Counsel:

Because the issues and facts appear to the Court to be the same, in all significant respects, as the issues and facts in *Morrison-Knudson*, 81-1891, a case arising from the District of Columbia Circuit, in which the parties are now seeking writs in the Supreme Court, the Court will withhold decision in this case pending action by the Supreme Court.

Very truly yours,

GILBERT F. GANUCHEAU
Clerk

By /s/ Barry W. Stiebing
BARRY W. STIEBING
Chief
Judicial Support Division

/gta

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